

IN THE SUPREME COURT OF THE STATE OF ALASKA

DOCKETING STATEMENT A

For Use in Appeals Under Appellate Rule 204 and 218

INSTRUCTIONS FOR MULTIPLE PARTIES OR ATTORNEYS: If there are multiple parties or attorneys, repeat the appropriate box. This may be done on a separate page. Please clearly indicate which attorney represents which party.

(for court system use)

No. _____

1. TYPE OF APPEAL

a. ☒ General Civil Rule Appeal
(App. Rule 204)

b. ☐ Appeal in Child Custody Case
(App. Rule 218)

2. PARTY FILING APPEAL (Appellant) CROSS-APPEAL IN NO. S-17834

a. Name Vote Yes for Alaska's Fair Share	b. Status in the Trial Court <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
c. Party Mailing Address (not attorney's address) 920 West 6th Ave, Suite 100	<input type="checkbox"/> Other. Specify: _____
City State Zip Code Anchorage AK 99501	d. Telephone 907-278-8000

3. APPELLANT'S ATTORNEY

a. Name Robin O. Brena and Jack Wakeland	b. Bar Number 8410089 and 0911066
c. Attorney Mailing Address 810 N Street, Suite 100	d. Telephone 907-258-2000
City State Zip Code Anchorage AK 99501	e. Fax 907-258-2001
	f. Firm/Agency Brena, Bell & Walker, P.C.

4. PARTY APPEALED AGAINST (Appellee) [All parties in the trial court when the final order/judgment were entered are appellees and must be listed if they did not file a notice of appeal. AR 204(b)(1) & (g).]

a. Name Res. Dev. Council of Alaska (see attached list)	b. Status in the Trial Court <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
c. Party Mailing Address 121 W. Fireweed Lane, Ste 250	<input type="checkbox"/> Other. Specify: _____
City State Zip Code Anchorage AK 99503	d. Telephone 907-276-0700

5. APPELLEE'S ATTORNEY

a. Name Matt Singer and Lee Baxter	b. Bar Number 9911072 and 1510085
c. Attorney Mailing Address 420 L Street, Ste 400	d. Telephone 907-339-7125
City State Zip Code Anchorage AK 99501	e. Fax 503-796-2900
	f. Firm/Agency Schwabe, Williamson & Wyatt, P.C.

6. SUPERIOR COURT PROCEEDING

a. Case No. 3AN-20-05901CI	b. Superior Court Judge Thomas A. Matthews	c. Date Judgment Distributed 07/17/2020				
d. Post-Judgment Motions: List all post-judgment motions that affect time for filing appeal. See Appellate Rule 204(a)(3).						
DATE OF FILING		DATE ORDER DISTRIBUTED				
Month	Day	Year	Type of Post-Judgment Motion	Month	Day	Year

7. CONSTITUTIONAL ISSUES

Is the constitutionality of a state statute or regulation at issue in this appeal?

☒ Yes

☐ No

If yes, cite statute or regulation: _____

8. FINALITY OF JUDGMENT OR ORDER BEING APPEALED

- a. ☒ The judgment or order being appealed is final and disposes of **ALL** claims by **ALL** parties. (The judgment or order is final under City and Borough of Juneau v. Thiboudeau 595 P.2d 626 (AK 1979).)
- b. ☐ The judgment or order being appealed does not dispose of all claims by all parties but is final under Civil Rule 54(b). (The trial court's Civil Rule 54(b) order must be attached.)
- c. ☐ The judgment or order being appealed is not final. The authority for this appeal is _____

9. ATTACHMENTS

The following items are submitted with this form (except that cross-appellants need not submit item a.):

- a. ☒ A copy of the final order or judgment from which the appeal is taken.
- b. ☒ A statement of points on appeal.
- c. ☒ A \$250 filing fee or ☐ a motion to appeal at public expense (financial statement affidavit form must be included).
☐ a motion to waive filing fee (if basis for motion is inability to pay, financial statement affidavit form must be included).
☐ an application for exemption from filing fee under AS 9.19.010.
☐ no filing fee is required because appellant is ☐ represented by court-appointed counsel, and AS 9.19.010 does not apply.
☐ the state or an agency thereof.
☐ an employee appealing denial of benefits under AS 23.20 (Employment Security Act)
- d. A \$750 cost bond or deposit or
☐ a copy of a superior court order approving appellant's supersedeas bond or a copy of appellant's motion to the superior court for approval of a supersedeas bond.
☐ a motion to waive cost bond (if basis for motion is inability to pay, financial statement affidavit form must be included).
☐ a motion to appeal at public expense (financial statement affidavit form must be included).
☐ no cost bond is required because appellant is ☐ represented by court-appointed counsel.
☐ a state agency, municipality, or state or municipal officer.
☐ an employee appealing denial of compensation by Alaska Workers' Compensation Board or denial of benefits under AS 23.20 (Employment Security Act).
- e. Designation of transcript ☐ submitted ☐ not submitted (no transcript being requested) ☐ motion to extend submitted
Designation of Transcript was filed 07/20/20 by RDC Appellants.

July 21, 2020

Date

//s// Robin O. Brena

Signature of Appellant or Appellant's Attorney

CERTIFICATE OF SERVICE

I certify that on July 21, 2020 a copy of the notice of appeal, this docketing statement, and all attachments (except filing fee and cost bond) were

e mailed	delivered	to All Parties (listed)
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Matt Singer, Lee Baxter,
<input type="checkbox"/>	<input type="checkbox"/>	Margaret Paton-Walsh, and Cori Mills,
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Hon. Thomas A. Matthews
<input type="checkbox"/>	<input type="checkbox"/>	_____
<input type="checkbox"/>	<input type="checkbox"/>	_____

Signature: //s// Elaine Houchen

FILING INSTRUCTIONS

File original docketing statement and notice of appeal with all attachments listed in #9 and ONE copy of ALL except filing fee and cost bond.

ATTACHMENT TO DOCKETING STATEMENT A

4. PARTIES APPEALED AGAINST	
Name	Resource Development Council of Alaska, Inc.
Status at Trial Court	Plaintiff
Mailing Address	121 W. Fireweed Lane, Suite 250
Telephone	(907) 276-0700
Name	Alaska Trucking Association, Inc.
Status at Trial Court	Plaintiff
Mailing Address	3443 Minnesota Drive
	Anchorage, AK 99503
Telephone	(907) 276-1149
Name	Alaska Miners Association, Inc.
Status at Trial Court	Plaintiff
Mailing Address	121 W. Fireweed Lane, Suite 102
	Anchorage, AK 99503
Telephone	(907) 563-9229
Name	Associated General Contractors of Alaska
Status at Trial Court	Plaintiff
Mailing Address	8005 Schoon Street
	Anchorage, AK 99518
Telephone	(907) 561-5354
Name	Alaska Chamber
Status at Trial Court	Plaintiff
Mailing Address	471 W. 36th Avenue, Suite 200
	Anchorage, AK 99503
Telephone	(907) 278-2722
Name	Alaska Support Industry Alliance
Status at Trial Court	Plaintiff
Mailing Address	3301 C Street, Suite 205
	Anchorage, AK 99503
Telephone	(907) 563-2226
All parties listed above are represented by	Matt Singer and Lee Baxter Schwabe, Williamson & Wyatt, P.C. 420 L Street, Suite 400 Anchorage, AK 99501 (907) 339-7125

4. PARTIES APPEALED AGAINST	
Name	State of Alaska, Lieutenant Governor Kevin Meyer
Status at Trial Court	Defendant
Mailing Address	
Telephone	
Name	State of Alaska, Division of Elections, Director Gail Fenumiai
Status at Trial Court	Defendant
Mailing Address	P. O. Box 110017 Juneau, AK 99811-0017
Telephone	(907) 465-4611
Name	State of Alaska, Division of Elections
Status at Trial Court	Defendant
Mailing Address	P. O. Box 110017 Juneau, AK 99811-0017
Telephone	(907) 465-4611
The State Parties listed above on this page are represented by	Margaret Patton-Walsh (0411074) Cori Mills (1212140) Assistant Attorneys General State of Alaska, Department of Law 1031 W. Fourth Ave., Suite 200 Anchorage, AK 99501 (907) 269-5100

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity as)
Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
Of the Alaska Division of Elections; the)
STATE OF ALASKA,)
DIVISION OF ELECTIONS;)
and VOTE YES FOR ALASKA'S FAIR)
SHARE,)

Defendants.)

Case No. 3AN-20-05901CI

**ORDER REGARDING MOTIONS TO DISMISS AND MOTIONS FOR
SUMMARY JUDGMENT**

This case involves a dispute over payment to petition circulators. But more than that, it also involves a dispute over fundamental constitutional rights. The petition, if approved by the voters, would change the oil and gas production tax for certain oil fields on the North Slope. Plaintiffs, a group of companies opposed to the petition "For Alaska's Fair Share,"¹ seek an order declaring that petition circulators were paid money in excess of the statutory limit of \$1 per signature, and an injunction preventing the State from counting voters' signatures on the petition because of payments made to the circulators. The Vote Yes defendants offer an alternative interpretation of the payment statutes, but also challenge its constitutionality. The State Defendants, for their part, challenge the remedy sought

¹ The Petition is formally known as 190GTX.

by Plaintiffs—disregard of all voters' signatures gathered by the paid circulators. The State argues that remedy is inconsistent with the State's responsibility under the applicable statute.

Ultimately, this case turns on the Court's interpretation of two provisions of the election statutes governing initiatives, AS 15.45.110(c), and AS 15.45.130. The Alaska Constitution enshrines the right of the people to propose and enact laws by initiative, and to approve or reject acts of the legislature by referendum.² Also implicated are fundamental First Amendment rights to engage in core political speech.

Plaintiffs Resource Development Council for Alaska, Alaska Chamber, Alaska Miners Association, Alaska Support Industry Alliance, Alaska Trucking Association, and Associated General Contractors of Alaska (collectively referred to as "RDC" or "Plaintiffs"), have brought this action seeking declaratory judgment and an injunction against the State and sponsors of the ballot measure at issue. The state Defendants include the lieutenant governor and Director of the Division of Elections in their official capacities, along with the State Division of Elections (collectively referred to as the "State"). Defendant Vote Yes for Alaska's Fair Share ("Fair Share" or "Vote Yes") is the official ballot group for the state-wide initiative seeking a change in the oil and gas production tax. All parties are represented by counsel. Before the Court are three motions: 1) the State Defendants' April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)*;³ 2) Defendant Fair Share's May 18, 2020, *Motion to Dismiss*; and 3) Plaintiffs' June 2, 2020 *Cross Motion for Partial Summary Judgment*. These three motions are interrelated as they ask to the Court to interpret two provisions of Alaska's election statutes relating to voter initiatives, AS 15.45.110(c) and AS 15.45.130.

For the reasons which follow, the Court grants the Defendants' two Motions to Dismiss, and denies the Plaintiff's Cross-Motion for Summary Judgment. The Court

² Alaska Const. art. XI, § 1.

agrees with the Plaintiffs' statutory interpretation of the signature payment statute, AS 15.45.110(c), but the statute is constitutionally flawed and therefore invalid. In addition, the Court agrees with the State's statutory interpretation of the circulator certification statute, AS 15.45.130. Alternatively, Plaintiffs' proposed remedy and request for injunctive relief—disregard of 39,000 valid signatures on the petition—is constitutionally flawed and would result in the disenfranchisement of thousands of Alaska voters who did nothing wrong.

I. ALASKA'S INITIATIVE PROCESS

Alaska allows its citizens to place propositions on the ballot through an initiative process.⁴ The initiative allows people the ability to introduce legislation through popular vote by allowing the citizens, through the collection of voter signatures, to propose legislation and make it law.⁵ Generally speaking, this process is known as direct democracy, which provides the opportunity for the people to draft legislation directly through "grass roots" efforts, as opposed to through the legislature. Petition circulation is "core political speech," because it involves political change made through interactive communication.⁶ Although this kind of speech is protected by the First Amendment, there must also be regulation of elections to ensure they have qualities of fairness and honesty.⁷ This policy is to ensure that there is some order, rather than chaos, to accompany the democratic process.⁸

The process begins when an initiative is proposed by an application containing the specific bill to be initiated.⁹ The constitution restricts certain subjects

³ Defendants filed their motion in response to Plaintiff's Motion to Characterize Case as Non-Routine.

⁴ Alaska Const. art. XI, § 1; see also AS 15.45.010–.245 (stating procedures regarding initiative law-making).

⁵ See Ryan K. Manger, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 St. Louis U. Pub. L. Rev. 177, 179 (2000) (describing the general process of direct democracy in the United States).

⁶ *Buckley v. Am. Constitutional L. Found., Inc.*, 525 U.S. 182, 186 (1999).

⁷ *Id.* at 187.

⁸ *Id.*

⁹ Alaska Const. art. XI, § 2.

from the initiative process.¹⁰ In addition, if at any time before the election, substantially the same measure has been enacted, the petition becomes void.¹¹ The application must be signed by at least 100 qualified voters as sponsors and is then filed with the lieutenant governor.¹² If it is in the proper form,¹³ then the lieutenant governor makes an initial certification.¹⁴ After certification of the application, a petition is prepared for circulation by the sponsors.¹⁵ By statute, petition circulators must meet certain residency requirements, and the amount they may be paid is limited to \$1 per signature.¹⁶ The petition must be signed by a minimum number of qualified voters located throughout the state. The minimum number is equal to at least ten percent (10%) of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent (7%) of those who voted in the preceding general election in the house district.¹⁷ Once the petition sponsors have obtained the required number of minimum signatures of qualified voters,¹⁸ the petition may be filed with the lieutenant governor.¹⁹ Before being filed, each petition must be certified by an affidavit of the person who personally circulated the petition.²⁰ Once filed, the lieutenant governor has sixty (60) days to review the petition and determine that it was properly filed.²¹ This process involves a review of whether petition has been signed by the proper number of qualified voters in the required number of house districts throughout the

¹⁰ Alaska Const. art. XI, § 7.

¹¹ Alaska Const. art. XI, § 4.

¹² Alaska Const. art. XI, § 2; *see also* AS 15.45.020 (filing of application).

¹³ *See* AS 15.45.030 (form of application).

¹⁴ Alaska Const. art. XI, § 2; *see also* AS 15.45.070 (review of application); 6 AAC 25.240.

¹⁵ AS 15.45.090 (preparation of petition).

¹⁶ AS 15.45.105 (qualifications of circulator); AS 15.45.110 (circulation of petition).

¹⁷ Alaska Const. art. XI, § 3.

¹⁸ The petition sponsors have one year to obtain the required signatures.

¹⁹ Alaska Const. art. XI, § 3.

²⁰ AS 15.45.130 (certification of circulator).

²¹ AS 15.45.150 (review of petition).

state.²² If the lieutenant governor determines the petition has been properly filed and meets criteria, then it is placed on the ballot for the voters to decide.²³

II. FACTS AND PROCEEDINGS

The Complaint indicates that in October, 2019 the Alaska Division of Elections provided printed booklets to the sponsors of the 19OGTX initiative.²⁴ Advanced Micro Targeting, a national professional signature gathering company was involved to collect the required signatures to put 19OGTX on Alaska's state-wide ballot.²⁵ There were apparently 786 signed petition booklets containing signatures in support of placing 19OGTX on the ballot, and 544 of them were submitted by circulators hired by Advanced Micro Targeting.²⁶ Those circulators swore that they had not "entered into an agreement with a person or organization in violation of AS 15.45.110(c)."²⁷ That section does not permit a circulator to be paid more than \$1 per signature. Plaintiffs allege they determined by public filings that Advanced Micro Targeting was paid \$72,500 by Vote Yes for Alaska's Fair Share. They further allege that Advanced Micro Targeting offered to pay its circulators more than the maximum \$1 per signature by advertising it would pay signature gatherers between \$3,500 to \$4,000 per month, expecting around 100 signatures per day, six days per week.²⁸ On April 10, 2020, Plaintiffs filed a complaint requesting declaratory and injunctive relief, requesting the Lieutenant Governor to invalidate petition booklets not properly certified and all subscriptions contained within those booklets.²⁹

The State Defendants brought a *Motion to Dismiss Pursuant to Alaska Rule 12(b)(6)*, arguing for the Court to hold that the signatures cannot be invalidated

²² AS 15.45.160.

²³ AS 15.45.180 and 15.4.190.

²⁴ Compl. at 4.

²⁵ Compl. at 4.

²⁶ Compl. at 5.

²⁷ Compl. at 5.

²⁸ Compl. at 5.

²⁹ Compl. at 8.

solely because “circulators were paid more than \$1 per signature.”³⁰ The State argues that the Alaska Supreme Court construes the initiative statutes liberally to protect the right of the people to propose and enact laws, and that this Court should construe statutes to avoid the “wholesale disenfranchisement of qualified electors.”³¹ Significantly, the State also contends that the initiative statutes do not require anything more than a “facial review” of the circulator certifications by the Lieutenant Governor, a requirement that was already met in this case.

Plaintiffs oppose the State’s motion, arguing that Alaska law prohibits the Lieutenant Governor from counting petition signatures that are supported by false circulator affidavits. Plaintiffs also assert that Defendants’ position ignores the intent of the legislature, and that Plaintiffs’ position is supported by both Alaska law and law from other states. For these reasons, Plaintiffs contend the Complaint pleads a proper cause of action (for injunction and declaratory relief) and request a denial of the *Motion to Dismiss*.

Fair Share has joined in the State’s Motion and arguments, but also filed a separate *Motion to Dismiss* on May 18, 2020. Fair Share contends that Plaintiffs’ interpretation of AS 15.45.110(c)—restricting any form of payment if it exceeds \$1 per signature—would be an unconstitutional restriction on free speech. Arguing against the Plaintiffs’ statutory interpretation, Fair Share also alleges that the legislative history shows the statute should only apply to compensation made per signature, and that the remedy is not disenfranchisement of voters.

Plaintiffs oppose Fair Share’s *Motion to Dismiss*, and also filed their own *Cross Motion for Partial Summary Judgment*. Plaintiffs argue that the statute (AS 15.45.110(c)) is not unconstitutional, and that the legislative history actually supports the conclusion that the payment limitation applies to all types of compensation. In Plaintiffs’ view, no more than \$1 per signature may be paid regardless of the method of payment (or the amount of time it takes to collect the signatures). Plaintiffs also

³⁰ State Def.’s Cross-Mot to Dismiss at 14 (Apr. 30, 2020).

urge the Court to hold that AS 15.45.130 strictly prohibits the Lieutenant Governor from counting subscriptions (signatures) supported by a false statement. Defendant Fair Share opposes Plaintiffs' *Cross Motion*.

III. DISCUSSION

The parties in this case have raised issues regarding interpretation of two key provisions of the initiative statutes: AS 15.45.110(c) and AS 15.45.130. Then, the Court is faced with the question posed by the Vote Yes defendants: whether the prohibition on circulator payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on political speech.

A. Statutory Construction

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."³² This involves consideration of "three factors: the language of the statute, the legislative history, and the legislative purpose behind the statute."³³ The court is to adopt "the rule of law that is most persuasive in light of precedent, reason, and policy."³⁴

The Alaska Supreme Court has "rejected a mechanical application of the plain meaning rule in favor of a sliding scale approach."³⁵ However, the language of the statute is the "primary guide." It is presumed "that every word in the statute was intentionally included, and must be given some effect."³⁶ "The language of the statute is 'construed in accordance with [its] common usage,' unless the word or

³¹ State Def.'s Cross-Mot to Dismiss at 10.

³² *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 905 (Alaska 1987).

³³ *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

³⁴ *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1133 (Alaska 2009) (citing *Enders v. Parker*, 66 P.3d 11, 13–14 (Alaska 2003)).

³⁵ *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 150 (Alaska 2002).

³⁶ *Id.* at 151.

phrase in question has 'acquired a peculiar meaning, by virtue of statutory definition or judicial construction.'³⁷

As noted above, in Alaska the voters' ability to bypass the legislature and enact laws by initiative is a right guaranteed by the state constitution.³⁸ The requirements of the constitutional and statutory provisions regarding the use of initiatives should be liberally construed so that the people are permitted to vote and express their will on proposed legislation. As such, all doubts as to technical deficiencies or failure to comply with the exact letter of procedure are resolved in favor of permitting the people to vote.³⁹

With these principles in mind, the starting point for the Court's analysis is the language of the statutes, and the parties' competing interpretations.

B. Does AS 15.45.110(c) Prohibit Any Type of Payment to Petition Circulators, if Those Payments Effectively Pay Circulators More Than \$1 Per Signature?

As noted above, Alaska determines the meaning of statutory language beginning with the plain meaning of the statutory text.⁴⁰ The legislative history of a statute can sometimes suggest a different meaning, but "the plainer the language of the statute, the more convincing contrary legislative history must be."⁴¹ "Even if legislative history is 'somewhat contrary' to the plain meaning of a statute, plain meaning still controls."⁴²

AS 15.45.110 provides for circulation of petitions, certain prohibitions and penalties for violation. The statute provides in pertinent part:

(c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or organization may

³⁷ *Id.* at 150–51 (quoting *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783 788 (Alaska 1996)).

³⁸ Alaska Const. art. XI, § 4.

³⁹ *Boucher v Engstrom*, 528 P.2d 456, 462 (Alaska 1974), *overruled on other grounds by McAlpine v Univ. of Alaska*, 762 P.2d 81 (Alaska 1988); *see also, Thomas v Bailey*, 595 P.2d 1, 3 (Alaska 1979).

⁴⁰ *Hendricks-Pearce v. State, Dep't of Corr.*, 323 P.3d 30, 35 (Alaska 2014).

⁴¹ *Id.* (quoting *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

⁴² *Id.* (quoting *Estate of Kim ex rel. Alexander v. Cox*, 295 P.3d 380, 387 (Alaska 2013)).

not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

(d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.

(e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.⁴³

In this case, Plaintiffs argue the language of the statute is clear and unequivocal—\$1 per signature is the maximum amount that can be paid to collect signatures on a petition, no matter what. Defendant Fair Share argues in its *Motion to Dismiss* that AS 15.45.110(c) does not restrict all forms of compensation for petition circulators. Fair Share contends that Plaintiffs' interpretation is incorrect, and that if the Court interpreted the statute to restrict all types of compensation, it would be an unconstitutional restriction on free speech. The constitutional concerns are addressed below. But first, does the statute actually prohibit any *form* of payment if it ends up being greater than \$1 per signature, or does it only prohibit *signature-based* payment?

The plain meaning of the words suggest no ambiguity. Petition circulators may not *receive* payment that is greater than \$1 per signature. The wording of the statute does not suggest it is capable of supporting Fair Share's interpretation. There is no discussion about the "form of payment." Instead, the language restricts the "amount of payment." A simple reading the plain words shows that if a circulator received payment that ended up being greater than \$1 per signature, no matter how it was received, it seems the statute would prohibit it.

Defendant Fair Share argues that the legislative history shows that the statute was originally introduced to prohibit the *signature-based type of payment* and leave other forms of payment unrestricted. In support of this argument, Fair Share points to excerpts from the legislative history.

⁴³ AS 15.45.110(c)–(e).

In the Senate Judiciary Committee meeting held on March 18, 1998, Senator Sharp was the proponent of Senate Bill 313, which in part concerned the \$1 limit portion of AS 15.45.110(c). Senator Sharp stated:

And [Senate Bill 313] also prohibits payment per signature by the sponsor. Payment would still be allowed by the hour or any other method. And the reason for that, Mr. Chairman, is that Leg Legal has said that, in the Lower 48 where they prohibited payments of any kind for obtaining signatures of an initiative, it was declared [sic] unconstitutional restraint of the process. But they do believe other states have at least prohibited payments by the signature, and that has stood up in court so far. So this proposed legislation would do that.⁴⁴

And so it is true that, at the very least, the bill was introduced intending to restrict the very signature-based payments that are at issue here. But analysis of the legislative history does not stop there. Plaintiffs argue that although the bill was introduced with that intent, it was revised in the House and eventually enacted in a form that restricted payments of any type. The original language of Senate Bill 313 contained substantially different language than the current statute. The original Bill as introduced in the Senate proposed language containing a crucial statement: "*This subsection does not prohibit a sponsor from being paid an amount that is not based on the number of signatures collected.*"⁴⁵ But the finally enacted legislation omitted that language. When the Bill was debated in the House, Representative Davies voiced a concern over removing the original language, stating:

I don't understand what the state interest is in slowing down getting signatures. But let me just say one other thing about the—the amendment would limit the amount of money that you could pay, and the existing language [from the original Bill] only limits the way in which you make payment. It doesn't limit the amount. You could pay the guy 100 bucks an hour if you want. There's no limit to how much you're paying.⁴⁶

⁴⁴ Hearing on S.B. 313 before the S. Judiciary Comm., 1998 Leg., 20th Sess. 20–21 (Alaska Mar. 18, 1998) (Def. Fair Share's Ex. 1) (statement of Sharp).

⁴⁵ Senate Bill No. 313 (Feb. 2, 1998) (Pl.s' Ex. A) (emphasis added).

⁴⁶ Hearing on S.B. 313 before the H. Finance Comm., 1998 Leg., 20th Sess. 78–79 (Alaska Mar. 8, 1998) (statement of Rep. Davies).

And because of that difference—I think that the existing language is much less subject to the constitutional challenge than the amendment. The amendment gets closer to a—in fact, is a limit. It's a hard limit in terms of how much you can pay. And as that—and I agree that it's different than the exact court case, but I think it's closer to the court case than the language that's in the bill, and for that reason is more likely to be overturned than the bill—than the language in the bill.⁴⁷

This passage from the debate in the House shows that the critical language from the original Bill was intentionally amended out of the bill and replaced. The legislation as passed is plainly a restriction on all forms of payment. The present statutory language, unlike the language of the original Senate Bill, contains a very specific restriction on payment. It is as noted by Representative Davies "a hard limit in terms of how much you can pay."⁴⁸

As Plaintiffs point out, the Legislature had another opportunity to permit other forms of payment in 2009, when House Bill 36 was introduced. That bill sought to add language to AS 15.45.110(c) stating that the subsection does not prohibit a person or organization from employing a circulator and paying an hourly wage or salary.⁴⁹ But again, the passed legislation did not include such language.

Returning to the statute as enacted, Senator Sharp noted that people might often assume "persons obtaining signatures on ballot initiatives are volunteers who believe strongly in a cause," and therefore the goal of Senate Bill 313 was to bring the process back to a more grass roots effort.⁵⁰ Immediately, Senator Sharp was concerned with what kind of laws held constitutional muster in the Lower 48, and stated that as a reason for proposing the initial cap on payment by signature.⁵¹ It seems that the legislature attempted to get as close as possible to prohibiting payment to petition circulators, mindful of *Meyer v. Grant*.⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ House Bill No. 36 (Pl.s' Ex. C).

⁵⁰ *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

⁵¹ *Id.*

⁵² *Meyer v. Grant*, 486 U.S. 414 (1988), is discussed below.

Fair Share's argument that the statute allows other forms of payment, and only limits "per signature payments" ignores the plain language of the statute. While it certainly is true that the original intent of the bill would support Fair Share's reading, that is not what the language plainly says. To infer that the statute allows other forms of payment, even if doing so might exceed \$1 per signature, requires reading into the statute additional language that is simply absent. It is apparent, based on the plain language of the statute—and buttressed by the fact that the legislature had the opportunity to exempt other forms of payment yet chose not to do so—that AS 15.45.110(c) prohibits any form of payment if it ends up exceeding \$1 per signature gathered.

This Court cannot construe the statute to mean that monthly, hourly or salary type payments are permitted when the amount paid exceeds \$1 per signature. And it seems that, based on the transcripts of the 1998 hearings, the legislature was well aware of the constitutionality issue, and yet enacted the legislation with a hard limit of \$1 per signature regardless.

C. Does the \$1 Per Signature Payment Limit of AS 15.45.110(c) create an Unconstitutional Restriction on Political Speech?

"The Alaska Constitution provides that all political power is inherent in Alaska's people and 'founded upon their will only.'"⁵³ The people have the constitutional right to legislate directly by initiative.⁵⁴ And the people have the constitutional right to vote in any state or local election.⁵⁵ "The voters' right to enact laws by the initiative process requires the Court to interpret legislative procedures in favor of the exercise of the initiative power."⁵⁶

Petition circulation is core political speech because it involves interactive communication concerning political change, and First Amendment protection for

⁵³ *Meyer v. Alaskans for Better Elections*, No. S-17629, 2020 WL 3117316, at *1 (Alaska June 12, 2020).

⁵⁴ *Id.* at *1.

⁵⁵ Alaska Const. art. V, § 1.

⁵⁶ *N. W. Cruiseship Ass'n of Alaska, Inc. v State, Office of Lieutenant Governor, Division of Elections*, 145 P.3d 573, 582 (Alaska 2006).

such interaction is therefore at its zenith.⁵⁷ In considering a constitutional challenge to an election law, a court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interest put forward by the State as justifications for the burden imposed by its rule.⁵⁸ The United States Supreme Court has said repeatedly that curbs on core political speech are to be strictly construed.⁵⁹ Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests alleged to justify those restrictions.⁶⁰ A state's interest in ensuring the integrity of the election process and preventing fraud is compelling, but it bears the burden of proving that a regulation is narrowly tailored.⁶¹

Here, Fair Share argues that if AS 15.45.110(c) is interpreted to prohibit any type of payment that exceeds \$1 per signature, such interpretation would not constitutionally stand. In support of this assertion, Fair Share relies heavily on the United States Supreme Court case *Meyer v. Grant*, which held that a Colorado statute prohibiting the use of paid petition circulators abridged the right to engage in political speech, and was therefore unconstitutional.⁶² Freedom of Speech is guaranteed by the First Amendment to the United States Constitution, and is among "the fundamental personal rights and liberties which are secured to all persons."⁶³ The *Meyer* Court applied strict scrutiny because it determined that initiative petition

⁵⁷ *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008) (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

⁵⁸ *Id.* at 1034.

⁵⁹ See *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 499 (1985); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

⁶⁰ *Buckley*, 525 U.S. at 193–94. "When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review, and a State's important regulatory interests are typically enough to justify reasonable restrictions." *Id.* at 206 (J. Thomas, concurring).

⁶¹ *Nader*, 531 F.3d at 1037.

⁶² *Meyer*, 486 U.S. at 414.

⁶³ *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

circulation involves both the expression of a desire for political change and a discussion of the merits of the proposed change.⁶⁴

The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.⁶⁵

In its holding, the *Meyer* Court reasoned that the Colorado statute had an effect of restricting political expression by limiting the number of voices who convey the message and the hours they can speak, and so it limited the size of the audience they can reach.⁶⁶ The statute also made it less likely that the proponent of an initiative could garner the number of signatures necessary to place the matter on the ballot, limiting their ability to make the matter the focus of statewide discussion.⁶⁷ In essence, the prohibition against paid circulators had an inevitable effect of reducing the total amount of speech on a public issue.⁶⁸

The US Supreme Court was "not persuaded by Colorado's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process."⁶⁹ This is apparently what Senator Sharp was concerned with when Senate Bill 313 was introduced in 1998.⁷⁰ But *Meyer*, and other cases which follow make clear that an outright ban on payment to circulators is unconstitutional. And so the critical question now is whether a hard limit on payment of \$1 per signature, as opposed to an outright ban on payment like in *Meyer*, is also unconstitutional. Plaintiffs here face a high burden because the speech at issue is fundamental to our electoral process and at the core of the First Amendment freedoms.

⁶⁴ *Id.* at 422; see also *Buckley*, 525 U.S. at 206 (J. Thomas, concurring).

⁶⁵ *Meyer*, 486 U.S. at 421 (quoting *Roth v United States*, 354 U.S. 476, 484 (1957) (citations omitted)).

⁶⁶ *Id.* at 422.

⁶⁷ *Id.*

⁶⁸ *Id.*

Since the *Meyer* decision, courts in other jurisdictions have faced similar issues. The Ninth Circuit in *Nader v. Brewer*, decided after *Meyer*, faced the question of whether a statute requiring circulators to be Arizona residents was constitutional.⁷¹ In rejecting the residence requirement, the Ninth Circuit held that such a restriction was also unconstitutional, because the restriction was not narrowly tailored to further the state's interest in preventing fraud. While the Court recognized that prevention of fraud is a legitimate concern, the statutory restriction was not supported by any evidence that out-of-state circulators caused any more problems than other circulators.⁷²

In *Prete v. Bradbury*, the Ninth Circuit upheld an Oregon ballot measure that prohibited payment to circulators based on the number of signatures obtained.⁷³ The measure specified that it did not prohibit payment not based on the number of signatures.⁷⁴ The Ninth Circuit found that Oregon had an important regulatory interest in preventing fraud and its appearances in its electoral process.⁷⁵ But *Prete* did not apply strict scrutiny, because the plaintiffs in that case only established that the ballot measure imposed "lesser burdens" upon the initiative process.⁷⁶ And, it is important to note that *Prete* declined to hold that the ballot measure was facially constitutional.⁷⁷ Significantly, the measure upheld in *Prete*, is virtually the same as the *original* language proposed in SB 313. In light of the Ninth Circuit's decision, it would seem that Representative Davies' concern for the constitutionality of the amendment (now AS 15.45.110(c)) was prescient.

⁶⁹ *Id.* at 428.

⁷⁰ See *supra* Section III.B.

⁷¹ *Nader*, 531 F.3d at 1037.

⁷² *Id.* The state argued that the residency restriction was narrowly tailored to ensure that circulators were subject to the state's subpoena power, and so the state can locate them within the ten-day period allotted for petition challenges. *Id.* The court did not find that the state provided evidence to support the contention the professional petition circulators can be "nomadic," or that there was any history of fraud related to non-resident circulators. *Id.*

⁷³ The *Prete* court declined to hold the ballot measure facially constitutional, but held that it could not conclude the measure imposed a "severe burden" under the First Amendment. *Prete v. Bradbury*, 438 F.3d 949, 953 n.5 (9th Cir. 2006).

⁷⁴ *Id.* at 952.

⁷⁵ *Id.* at 969.

AS 15.45.110(c) is to be viewed with exacting scrutiny because the \$1 limit significantly inhibits communication about proposed political change.⁷⁸ As discussed above, AS 15.45.110(c) imposes a "hard limit" on the *amount* a circulator can be paid, no matter how he or she might be paid. In that way, it is unlike the Oregon ballot measure discussed in *Prete* because that measure permitted other forms of payment, and more similar to the outright ban on payment analyzed by the Supreme Court of the United States in *Meyer*. Similar to the outright ban of any payment discussed in *Meyer*, a hard limit of \$1 per signature would have the similar inevitable effect of reducing the total quantum of speech on a public issue. The \$1 limit may not be the same as the complete prohibition of payment that the *Meyer* Court faced, but \$1 per signature is only one small step higher.

The same fundamental policies that caused the Supreme Court to take pause similarly apply when a circulator can be paid pocket change as opposed to no pay whatsoever: the size of the audience proponents can reach is limited; it is less likely that proponents will garner the number of signatures necessary to place the matter on the ballot; and limits their ability to "make the matter the focus of statewide discussion."⁷⁹ In fact, given Alaska's geographic expanse, and the exacting restrictions imposed on by AS 15.45.140, the limited pay of \$1 per signature becomes almost meaningless.

An example illustrates the point. AS 15.45.140 requires that sponsors of an initiative petition obtain signatures from qualified voters across the state, both on the road system and off. 1) The petition must be signed by qualified voters equal in number to ten percent (10%) of those who voted in the previous general election; 2) They must reside in at least three-fourths of the house districts of the state; and 3) Within each of the house districts described above, there must be at least seven

⁷⁶ *Id.* at 952.

⁷⁷ *Id.* at 953 n.5.

⁷⁸ See *Buckley*, 525 U.S. at 193–94.

⁷⁹ See *Meyer*, 486 U.S. at 422.

percent (7%) who voted in the preceding general election in the house district.⁸⁰ Alaska has forty (40) house districts ranging from the North Slope to Southeast, and from Anchorage to the Aleutians.⁸¹ It is not enough for a circulator to stand on the sidewalk in front of a shopping mall in Anchorage and gather signatures. Under the statute, circulators are required to obtain signatures in the vast remote parts of the state as well. Presumably, this is to ensure that a petition for a statewide ballot has enough support on a statewide basis.

But the limitation imposed by the undifferentiated \$1 per signature payment present very different obstacles to political speech when Alaska's geographic differences are considered. A similar number of ballots may have been cast in the 2018 general election in house districts 20 and 32, but each district presents far different challenges for petition circulators. District 20 covers Downtown Anchorage while District 32 covers Kodiak, Cordova and Seldovia.⁸² The required number of signatures for an initiative (7%) is roughly the same (413 vs 439), but the effort necessary to assure the minimum number of signatures from each district is far different.⁸³ Given the First Amendment's fundamental policy to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," Alaska's \$1 per signature limit surely infringes on that fundamental right.⁸⁴

If strict scrutiny is to be applied to AS 15.45.110(c), then there must be a compelling state interest, and the statute must be narrowly tailored to fit that interest.⁸⁵ Even though an interest in ensuring the integrity of the election process

⁸⁰ AS 15.45.140(a)(1), (2), and (3).

⁸¹ State of Alaska, Div. of Election, *House and Senate District Designations* (Dec. 9, 2013), <https://www.elections.alaska.gov/doc/forms/H07.pdf> (House and Senate District designations based on "Proclamation of Redistricting" dated July 14, 2013).

⁸² *Id.*

⁸³ State of Alaska, Div. of Elections, *Public Information Packet on Initiatives 25* (Jan. 4, 2019), <https://www.elections.alaska.gov/doc/forms/H34.pdf>.

⁸⁴ See *Meyer*, 486 US at 421.

⁸⁵ See *Nader*, 531 F.3d at 1037.

and preventing fraud is compelling, the statute must still be narrowly tailored.⁸⁶ Plaintiffs argue that several states prohibit per-signature payment of circulators, implying that it means these interests have been upheld as being narrowly tailored or constitutional in some way. And in fact, the Second Circuit upheld a statute against a First Amendment challenge in *Person v. New York State Board of Elections*:

We join the Eighth and Ninth Circuit in holding that a state law prohibiting the payment of electoral petition signature gatherers on a per-signature basis does not per se violate the First or Fourteenth Amendments. Like our sister circuits, we find the record presented to use provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in *Meyer*, or that the *alternative methods of payment it leaves available are insufficient*.⁸⁷

But here, AS 15.45.110(c) does not leave alternative methods for payment available, and so there is a greater restriction on circulators more akin to the problems described by the *Meyer* court.

No evidence or argument has been presented demonstrating how the \$1 per signature limit is narrowly tailored to fit any of the State's interests.⁸⁸ Plaintiffs repeatedly argue the integrity of the initiative process is paramount. When looking at the legislative history, it appears that the goals were to address potential problems in the initiative process: signature bounty hunters paid by the sponsors of initiatives, and to bring the process back to a more grass roots effort.⁸⁹ If the goal is to avoid "bounty hunting," the restriction actually contravenes that purpose by motivating circulators to get as many signatures as possible so they can be paid more. Additionally, an organization could choose to impose rules on their circulators to get a certain number of signatures even if they were paid hourly or monthly.⁹⁰ It is

⁸⁶ *Id.*

⁸⁷ 467 F.3d 141, 143 (2d Cir. 2006) (internal citations omitted) (emphasis added).

⁸⁸ Although the State is a party in this case, it has so far not taken a position on the constitutional issue, and has not argued the state has a legitimate interest in support of AS 15.45.110(c).

⁸⁹ *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44.

⁹⁰ In fact, Representative Grussendorf made a similar observation in 1998. "We have a suggestion as to the hourly rate, but I am concerned if you pay an hourly rate, then the person who is sponsoring or

also not persuasive enough, just as it was not for the *Meyer* Court, to argue that the purpose is to have sufficient grass roots support—given the significant effect on political speech.⁹¹

As discussed above, signatures on a petition must come from residents in at least three-fourths of the house districts in the state, a requirement that already assists in obtaining grass roots support from citizens.⁹² In fact, if a circulator traveled by plane to a village to collect signatures, it is doubtful that payment of \$1 per signature would be sufficient compensation—such circulator would truly be a volunteer regardless. Whether it was made to help garner grass roots support for initiatives, or to deter bounty hunting—the payment restriction under AS 15.45.110(c) is not narrowly tailored to accomplish those goals.

The hard limit on payment imposed under AS 15.45.110(c) poses a substantial burden on the free speech rights of petition sponsors. Because the limit is so low, circulators may be forced to effectively be volunteers.⁹³ And it seems, based on the legislative history, that the legislature truly intended to come as close to that result as possible without creating an outright unconstitutional law.⁹⁴

But legislating a cap of \$1 per signature on petition circulators is not a large enough step away from the facts underlying *Meyer* to withstand constitutional scrutiny. Perhaps if the original language allowing other forms of payment had

bankrolling a payroll as such (indiscernible) reductions and everything (indiscernible) workman's comp to other problems that come in there, or maybe even a (indiscernible) system that within an hour we expect you have X amount of petitions—or signatures. I don't know if we can get by — you know, around that way." *Hearing on S.B. 313 before the H. Finance Comm., supra* note 46 (statement of Rep. Davies).

⁹¹ See *Meyer*, 486 U.S. 414, 425 (1988).

⁹² See, e.g., AS 15.45.160(2) (requiring the lieutenant governor to determine in part whether the subscribers were residents in at least three-fourths of the house districts of the state).

⁹³ In fact, such a restricted payment would very likely lead to violation of Alaska's Wage & Hour laws, since there appears to be no exception to payment of minimum wages for petition circulators.

⁹⁴ See, e.g., *Hearing on S.B. 313 before the S. Judiciary Comm., supra* note 44 (Senator Sharp wanting to keep initiatives as "grass roots" efforts while minding that a complete ban on payment was found unconstitutional). It is also worth noting that no parties have argued that the residency requirement under AS 15.45.105 is unconstitutional, despite case law indicating it might be. See, e.g., *Nader*, 531 F.3d at 1037 (holding the state of Arizona failed to meet its burden of showing that a residency requirement was narrowly tailored to further the compelling interest in preventing fraud).

remained in the bill when it was passed,⁹⁵ the statute might have withstood scrutiny. But in its current form, it does not. In this Court's view, the prohibition on payment greater than \$1 per signature under AS 15.45.110(c) is an unconstitutional restriction on free speech protected by the First Amendment to the United States Constitution.

D. Is Requiring the State to Invalidate Signatures Gathered by Circulators Paid an Amount Greater than \$1 Per Signature an Appropriate Remedy?

Regardless of the arguments over the payment statute, the heart of Plaintiffs' claim is the request for injunctive relief to prevent counting of the voters' signatures. Plaintiffs rely upon the language of AS 15.45.130 which says the lieutenant governor "may not count subscriptions on petitions *not properly certified* at the time of filing or corrected before the subscriptions are counted."⁹⁶ They suggest the meaning is clear—the State may not count signatures where petition circulator makes a false statement in the certification. The State offers an alternative reading of the statute—that its role is to assure completeness, not to determine whether the circulators have made a truthful and accurate affidavit of circulation. Fair Share, for its part, argues the Plaintiffs' proposed remedy would result in a mass disenfranchisement of the voters—a result which would again violate the First Amendment. So in this context, what is the meaning of "properly certified?"

AS 15.45.130 requires petitions to be certified by an affidavit by the circulator of the petition. The statute specifies that such affidavit must state in substance eight different points, one of them being "that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c)"—the provision prohibiting payment greater than \$1 per signature. "[T]he lieutenant governor may not count subscriptions on petitions not properly certified."⁹⁷ Despite this language, the statute does not define what it means to be "properly certified."

⁹⁵ See *supra* Section II.A.

⁹⁶ AS 15.45.130.

⁹⁷ AS 15.45.130.

AS 15.80.010 contains a list of definitions applicable to the election laws including initiatives, but does not include a definition of "properly certified."⁹⁸

As they did with the payment statute (AS 15.45.110), Plaintiffs focus upon the plain language of section 130. But rather than the words "properly certified," Plaintiffs emphasize the penal language "may not count." The latter words emphasize the remedy sought by Plaintiffs but do not illuminate what it means to be "properly certified" in the first instance.

The State argues the petitions were in fact "properly certified" because they were complete when filed, and the Lieutenant Governor had no duty to investigate the truth of the statements contained within them. But is this interpretation of the statute consistent with its purpose? More importantly, does a "complete" but incorrect affidavit support the remedy requested?

Other provisions of the initiative statutes suggest the focus is on verification of signatures. For example, AS 15.45.160 provides the bases for determining when a petition is *improperly filed*. That statute discusses the qualifications of the subscribers, and focuses on the number of signatures gathered. It mentions nothing about the accuracy of the circulator's certification. Similarly, AS 15.45.150 provides a strict timeline (60 days) for the lieutenant governor to complete "review" of the petition. The State argues this short timeframe makes it entirely unrealistic to think the review process includes investigation of the circulators and the accuracy of their affidavits. Instead, the focus is on the voters who signed the petition and the need to verify each signature. This argument is not unreasonable. In the end, the statutory scheme provides no clear meaning as to when an affidavit is deficient or when a petition is not "properly certified."

Fair Share and the State both argue that the initiative statute should be construed liberally to protect the right of the people to propose and enact laws, and

⁹⁸ At oral argument, counsel was also questioned about a definition, but no party identified a statutory or other definition.

that doubts as to technical deficiencies should be resolved in favor of that purpose. Defendants also argue that a liberal construction is proper to avoid the disenfranchisement of voters, because voters have no control and no way to know about the payment of signature gatherers.

Defendants cite to several cases for the proposition that Alaska case law supports their construction, and the idea that the Alaska Supreme Court has previously declined to invalidate the ballots of voters based on error and avoided voter disenfranchisement.⁹⁹ Defendants analogize to *Kirkpatrick*,¹⁰⁰ a case from the Supreme Court of Missouri. Although it is worth noting that *Kirkpatrick* was analyzed under a burden-shifting approach, where the proponents needed to show—and in fact did show—the validity of the signatures despite irregularities in circular affidavits.¹⁰¹ Crucial to that court's analysis was the recognition that "[t]he only statutory purpose in having a notary sign the petition to begin with is to provide a double check on the validity of the signatures of the voters. If the validity of the voters' signatures can be otherwise verified, their signatures should not be invalidated by the notary's negligence or deliberate misconduct."¹⁰²

The Alaska Supreme Court has stated "the purpose of certification is to require circulators to swear to the truthfulness of their affidavits."¹⁰³ AS 15.45.130 requires a circulator to certify eight different points before the lieutenant governor is permitted to count subscriptions (signatures) on the filed petition and determine it to be sufficient. Of course, avoiding fraud and promoting the integrity of the process are important. So to enforce the requirements, the legislature has provided for specific, criminal penalties. A circulator making a false certification is subject to perjury charges and the class B misdemeanor provision under AS 15.45.110(c).

⁹⁹ See, e.g., *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010); *Willis v. Thomas*, 600 P.2d 1079, 1083 (Alaska 1979); *Fischer v. Stout*, 741 P.2d 217, 225 (Alaska 1987).

¹⁰⁰ *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449 (Mo. 1978).

¹⁰¹ *Id.* at 453.

¹⁰² *Id.* at 454.

¹⁰³ *N. W. Cruiseship Ass'n of Alaska*, 145 P.3d at 577.

In addition to the criminal penalties for the circulator, there are criminal penalties to a person or organization that offers or pays an improper payment to the petition circulator.¹⁰⁴ Further, even the voter signing the petition is subject to criminal penalties for signing the petition, knowing he or she is not a qualified voter.¹⁰⁵ Such voter commits the crime of Improper Subscription to Petition.¹⁰⁶ In addition to those involved in the initiative process, other participants in various phases of the electoral process are subject to criminal penalties for campaign misconduct and various forms of official misconduct.¹⁰⁷

When the Alaska voter and initiative statutes are read as a whole, it appears the overriding policy concern is to assure that only properly qualified voters sign petitions, cast ballots, and otherwise participate in the electoral process. The statutes should not be read as a trap for the unwary.

The Plaintiffs cite to certain out-of-state cases, arguing they are persuasive because they focus on preserving the integrity of the process and the purpose of providing truthful affidavits. The Supreme Court of Arizona, for example, did a survey of law in other states relating to this issue in *Brousseau v. Fitzgerald*.¹⁰⁸ That court concluded "the authorities agree that statutory circulation procedures are designed to reduce the number of erroneous signatures, guard against misrepresentations, and confirm that signatures were obtained according to law."¹⁰⁹ It went on to state:

The only way to protect the process from fraud and falsehood is to make such conduct unprofitable. We hold that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.¹¹⁰

¹⁰⁴ AS 15.45.110(c) and (d).

¹⁰⁵ AS 15.56.090.

¹⁰⁶ AS 15.56.090.

¹⁰⁷ See AS 15.56.012--199.

¹⁰⁸ *Brousseau v. Fitzgerald*, 456, 675 P.2d 713, 716 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The Ohio Supreme Court's analysis in *Schmelzer* also drew an important distinction between a technical defect and a substantial failure to meet a statutory requirement.¹¹¹ The *Schmelzer* court noted that "mere technical irregularities" would not be enough to disturb the election process.¹¹² And the Ohio court, in a different case, invalidated an entire petition on the basis of fraud when a circulator's affidavit knowingly verified false signatures.¹¹³

But this case does not involve false signatures. In fact, there is no allegation by Plaintiffs that the signatures were false or defective in any way—only that the circulators were paid too much. Why should it make a difference whether the circulator was paid \$1 or \$2 for a signature? Does it somehow increase the likelihood that false signatures will be submitted? How is the integrity of the process improved by restricting payment to the circulator to an amount which is plainly unenticing? On the other side of the clipboard, is an Alaska voter more likely to listen to the pitchman simply because of a miniscule payment? Is the voter more likely to be persuaded to sign the petition? And for the innocent but persuaded voter, should the signature be invalidated because of an error by the circulator?

Alaskan voters should not be disenfranchised on the basis of "technical errors."¹¹⁴ The *North West Cruiseship* case supports this Court's holding, because that Court upheld the narrowly tailored action by the Division. The Division's disqualification of a few pages that lacked the "paid by" information required by statute supported the integrity of the process while not brushing aside the rights of all the other innocent voters.¹¹⁵ But in so holding, the Court reiterated its directive that Courts should seek constructions which avoid the whole disenfranchisement of qualified electors. The Supreme Court upheld the lieutenant governor's actions because they struck the proper balance between "the people's right to legislate by

¹¹¹ See *State ex rel. Schmelzer v. Board of Elections*, 2 Ohio St.3d 1, 440 N.E.2d 801, 803 (1982).

¹¹² *Id.* at 802.

¹¹³ *State ex rel. Donofrio v. Henderson*, 4 Ohio App.2d 183, 211 N.E.2d 854 (1965).

¹¹⁴ *Miller*, 245 P.3d at 870 (quoting *Carr v. Thomas*, 586 P.2d 622, 625–26 (Alaska 1978)).

¹¹⁵ *N. W. Cruiseship Ass'n of Alaska, Inc.*, 145 P.3d at 578.

initiative and the goal of ensuring that petition subscribers are well-informed upon signing."¹¹⁶

The Alaska Supreme Court long ago set forth the policy for interpreting laws relating to the initiative process:

In matters of initiative and referendum, we have previously recognized that the people are exercising a power reserved to them by the constitution and the laws of the state, and that the constitutional and statutory provisions under which they proceed should be liberally construed. To that end all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.¹¹⁷

The right to vote by initiative is enshrined in the Alaska Constitution.¹¹⁸ Why should the people's right to vote give way when a circulator is paid a dime more than \$1 per signature? Beyond "integrity of the process," Plaintiffs offer little justification to interpret AS 15.45.130 to disenfranchise Alaska voters over a technical defect, especially when the statute has prescribed criminal penalties for circulators who fail to follow the law.

For these reasons, this Court holds that "properly certified" in AS 15.45.130 means the petition is "complete" and contains the proper signatures of Alaskan voters. A circulator's affidavit under AS 15.45.130 can still be properly certified even if it contains an incorrect statement regarding the requirements for the affidavit, so long as it otherwise meets statutory requirements. This is because the integrity of the process is upheld by criminal penalty for any circulator who breaks the law.

E. Alternatively, Does AS 15.45.130 Pose an Unconstitutional Restriction on Political Speech?

Because the parties have clearly indicated an intention to seek immediate appellate review, this Court offers the following alternative holding on the

¹¹⁶ *Id.*

¹¹⁷ *Municipality of Anchorage v Frohne*, 568 P.2d 3, 8 (Alaska 1977).

¹¹⁸ See Alaska Const. art. XI, § 1.

certification statute, AS 15.45.130. Fair Share argues that Plaintiffs' interpretation of the statutory scheme "does not survive the constitutional requirement that restrictions to political speech be narrowly construed to avoid encroachment into the constitutional rights of citizens."¹¹⁹ Even assuming Plaintiffs could achieve the remedy they seek in this case to prevent the Lieutenant Governor from counting the signatures in the petition booklets at issue, this Court has grave concern for the rights of the innocent voters who would be disenfranchised by the wholesale disregard of many thousands of petition signatures simply because of a technical defect, or even misdeed by the petition circulators.

As discussed above, petition circulation is core political speech because it involves interactive communication concerning political change.¹²⁰ Exacting scrutiny has been applied when the restrictions in question significantly inhibit communication with voters about proposed political change.¹²¹ A law surpasses exacting scrutiny when it is narrowly tailored to fit a compelling state interest.¹²²

AS 15.45.130 concerns petition circulation just like AS 15.45.110(c). But the statute includes a severe penalty. Section .130 provides that the "lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing." This means that AS 15.45.130 directly impacts the voters' right to engage in political speech since it requires the Lieutenant Governor to disqualify signatures when a petition is not "properly certified." Petitions must be certified by an affidavit containing at least eight different points.¹²³

¹¹⁹ Fair Share's Mot. to Dismiss at 7 (May 18, 2020).

¹²⁰ *Nader*, 531 F.3d at 1035 (quotations omitted) (citing *Meyer*, 486 U.S. at 422, 425).

¹²¹ *Buckley*, 525 U.S. at 193–94.

¹²² *Nader*, 531 F.3d at 1037.

¹²³ The affidavit must state in substance (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105; (2) that the person is the only circulator of that petition; (3) that the signatures were made in the circulator's actual presence; (4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be; (5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature; (6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c); (7) that the circulator has not violated AS 15.45.110(d) with respect to that petition; and (8) whether the circulator has received payment or agreed

The constitutional concern with AS 15.45.130 is the possibility that qualified voters will have their otherwise valid and proper political speech (their signatures) disregarded because of a knowing, or even unknowing, deficiency on an affidavit that is unrelated to the validity of the signatures. The voters who signed the petition booklets are innocent bystanders in this case, but they have constitutional rights as well. Their voices deserve to be heard, and should not be ignored simply because the circulator made a mistake. The circulator already faces the possibility of criminal action, but what redress for the innocent voter? Because Alaskan voters' right to bypass the legislature and enact laws directly is a right guaranteed by the state constitution,¹²⁴ and because it directly infringes on the First Amendment rights of the voters, the statutory remedy is subject to exacting scrutiny.

The high burden was succinctly stated in *North West Cruiseship*:

The voters who signed the . . . booklets have a right to participate in the initiative process and should not be disenfranchised because of the error of a circulator that had no impact upon them. This Court should construe the remedial portion of AS 15.45.130 only as broadly as is necessary to address the specific error. It should avoid an interpretation that requires a broader remedy that disenfranchises voters who did nothing wrong.¹²⁵

While the Alaska Constitution permits the legislature to prescribe additional procedures for the initiative process,¹²⁶ those procedures must be narrowly tailored to avoid the wholesale disenfranchisement of qualified electors.¹²⁷ The Alaska Supreme Court has consistently stated the policy is to construe statutory initiative procedures liberally and in favor of upholding proposed initiatives.¹²⁸ The Court has

to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition. AS 15.45.130.

¹²⁴ See Alaska Const. art. XI, § 4.

¹²⁵ *N. W. Cruiseship*, 145 P.3d at 587.

¹²⁶ Alaska Const. art. XI, § 6; see also, *Buckley*, 525 U.S. at 187 (recognizing the States have an interest in petition drives in order to ensure fairness and integrity).

¹²⁷ *Fischer*, 741 P.2d at 225.

¹²⁸ See *Boucher*, 528 P.2d at 462, overruled on other grounds by *McAlpine*, 762 P.2d 81; see also *Thomas*, 595 P.2d at 3 ("The right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right.").

steadfastly defended the right of Alaskans to enact law through the initiative process as “an act of direct democracy guaranteed by our constitution.”¹²⁹ The goal is for people to be permitted to vote and express their will on the proposed legislation.¹³⁰

But the Court’s inquiry is not directed at the wisdom of the petition, for that decision rests with the voters.¹³¹ To pass constitutional muster, the statute is subject to exacting scrutiny, similar to AS 15.45.110(c). In this case, the remedial statute AS 15.45.130 impacts freedom of political speech by permitting otherwise valid signatures to be disregarded because of the certification requirement. Because the statute aims at political speech, Plaintiffs (or the State) must show the law is substantially related to a sufficiently important governmental interest.¹³² Stated differently, in order to survive exacting scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”¹³³

Voting is a fundamental right. In Alaska, the right to petition is a constitutionally protected right. The integrity of the initiative process must be balanced against those rights. Those who violate the initiative statutes are already subject to criminal penalties for any malfeasance. Why then is disregard of the voters’ fundamental rights to engage in the initiative process a narrowly tailored remedy? Such a remedy disenfranchises the voters who did nothing wrong.

Further, disregarding the technical violation of the payment statute (which the court already determined was unconstitutional) by the circulators will act to promote the First Amendment rights of all parties to engage in core political speech. The voters will have the final say at the ballot box if the initiative is put to them for a vote. Plaintiffs have the right to comment on the merits of the petition, just as the backers

¹²⁹ *Yute Air Alaska, Inc. v McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985) (holding that courts should be reluctant to invalidate initiatives.)

¹³⁰ *Thomas*, 595 P.2d at 3.

¹³¹ *Boucher*, 528 P.2d at 463.

¹³² *Nat’l Association for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019); see also *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

¹³³ *John Doe No. 1*, 561 U.S. at 196 (citations omitted).

of Fair Share may comment on their position. By contrast, disregard of thousands of otherwise valid signatures operates like a sledgehammer on a mosquito. It may do the job, but it wreaks havoc in the process. And there is no justification for such a remedy simply because a circulator failed to meet a technical requirement, something very likely outside the knowledge of the registered voters, limiting their rights, and unrelated to the substance of the petition.

The Court, with the record before it, has not been offered persuasive information about the state interest in the legislative action (disregard of voters' signatures) outside of the interests discussed above, and that generally speaking procedures are created for initiatives to create order and preserve the integrity of the process. But such a remedy is anything but narrowly tailored. Instead, the statute disregards the rights of voters with the justification of a technical error—something that cuts deeply into the constitutional rights of Alaskans when there are other ways to ensure the veracity and integrity of the process, including the criminal penalties, as discussed above. Why should voters be disenfranchised because a circulator fails to meet technical statutory requirements?

In the Court's view, the remedy of not counting signatures contained in AS 15.45.130 is not narrowly tailored to accomplish the goals of integrity and enforcing veracity because there are other, less restrictive ways to accomplish those goals without stripping away the voters' rights. As such, the stated remedy under AS 15.45.130 is an unconstitutional restriction on the free speech rights of the disenfranchised voters.

IV. CONCLUSION

For the reasons explained herein, this Court holds:

- 1) Plaintiffs have not asserted a cause of action for which relief may be granted, and so the State Defendants' April 30, 2020 *Cross-Motion to Dismiss Pursuant to Alaska Civil Rule 12(b)(6)* is GRANTED.

2) Because the payment restriction under AS 15.45.110(c) is unconstitutional, Defendant Fair Share's May 18, 2020, *Motion to Dismiss* is GRANTED.

3) Plaintiffs' June 2, 2020 *Cross Motion for Partial Summary Judgment* is hereby DENIED.

4) Because of the Court's rulings above, Plaintiffs' July 6, 2020 *Motion for Summary Judgment* is now Moot.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of July, 2020.



Thomas A. Matthews
Superior Court Judge

I certify that on 7/16/20 a copy of this
Order was emailed to:

M. Singer / L. Baxter / M. Paton-Walsh
R. Brena / J. Wakeland

Judicial Assistant

